WONG TWEE KENG & ORS A

v.

WONG SWEE MIN & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM B
HINSHAWATI SHARIFF J
[CIVIL SUITS NO: MT 22-107-2005 & MT1 22-178-2006]
28 NOVEMBER 2012

SUCCESSION: *Probate - Validity of will - Whether wills and inter vivos gift made in suspicious circumstances - Whether beneficiaries under wills and gift had dispelled suspicious circumstances - Whether testators had testamentary capacity when wills and gift executed* C

SUCCESSION: *Probate - Testamentary capacity - Suspicious circumstances - Whether existed - Whether testators' health condition vitiated testamentary capacity to execute wills - Whether beneficiaries failed to dispel suspicious circumstances* D

The plaintiffs and the first defendant were children of Wong Lok Dow, deceased ('WLD') and his late wife Leong Siew Hwa ('LSH'). The second defendant was the first defendant's son. WLD had executed two wills, one dated 2 June 1997 ('the first will') and another dated 24 December 1997 ('the second will') and a declaration of *inter vivos* gift ('the *inter vivos* gift') dated 1 May 2002 while LSH had executed a will ('the third will') dated 24 December 1997. WLD owned and ran a coffee shop as a means of livelihood. He subsequently became a co-owner of a piece of land and pursuant to a joint-venture agreement with a developer, he became the owner of four units of houses ('the JV properties'). LSH died of old age in December 2002 aged 81 while WLD also died of old age in May 2003 aged 88. Under the first will, which WLD executed when he was aged 82 years and six months, he appointed LSH and the first defendant as executors and trustees of his estate and bequeathed to them his coffee shop and his co-ownership in the land under the joint-venture development. The second will which superseded the first and became WLD's last will and testament, was executed by him when he was aged 83. Under that will, WLD added the second defendant as an executor and trustee and also expressed his wish that if LSH predeceased him, then all his real and personal E F G H I

properties, rights, interests and claims should go to the first defendant absolutely. Pursuant to the *inter vivos* gift, the JV properties were transferred to the first defendant. Meanwhile, under the third will executed by LSH when she was aged 76, the two landed properties under her estate were also bequeathed to the first defendant. The evidence showed that except for the first defendant, who worked as a salesman after finishing school and then began running a school canteen with his wife, none of the plaintiffs had finished their secondary schooling and they all played various roles in the growth of WLD's coffee shop business. Only one of the plaintiffs remained unmarried and he stayed with his parents, caring for their needs into their old age. The plaintiffs pleaded case was that both WLD and LSH did not have testamentary capacity when they executed the wills and the *inter vivos* gift as they were both enfeebled by illness and old age to have had a sound disposing mind. The plaintiffs also pleaded that the wills and the *inter vivos* gift were made under suspicious circumstances.

Held (allowing the plaintiffs' claim):

(1) The evidence pointed to the irrefutable conclusion that there were suspicious circumstances surrounding the making of the wills and the *inter vivos* gift. The defendants had failed to dispel the suspicious circumstances. (para 49)

(2) The evidence did not show the slightest hint of anything that could be described as anything but normal in the relationship between WLD, his wife and his children, particularly the plaintiffs. The plaintiffs had a good relationship with their parents and there were no quarrels between the siblings either. The defendants did not prove that they were closer to their parents than the rest of the plaintiffs. Yet, all the plaintiffs had been excluded from the wills and the *inter vivos* gift. It was a situation that excited the suspicion of the court and the defendants had to explain. (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor;* dist) (paras 33, 35 & 37)

(3) As the evidence showed that WLD and LSH were very much in control of their mental faculties, how could it be possible for them to have named only one child and a grandchild to enjoy the fruits of everyone's efforts including the efforts of

the plaintiffs. It was an undeniable fact that all the children had worked and helped their parents together and whatever WLD and LSH had until the time of their deaths were the result and contribution of their efforts as a family. It was unimaginable that the parents would have allowed only one child and one grandson to take the whole of the benefits to the exclusion of the others. (para 48)

(4) It was apparent that the *inter vivos* gift, which formed the bulk of WLD's assets, was created to ensure they would, in all certainty, fall into the hands of the first defendant as bequeathing them by way of will was not a guarantee that the properties would be his in the event the wills were challenged. (paras 43 & 44)

(5) On the evidence of the illnesses and subsequent health conditions of WLD and LSH and the fact they were respectively aged 83 and 76 in 1997, the court did not, on the facts, find that those circumstances had vitiated their testamentary capacities to execute the wills and the *inter vivos* gift. (see para 23)

(6) There was clearly a space of about five years before their deaths when the last will of WLD and the will of LSH were executed. If WLD and LSH had wanted to change their wills, they had more than ample opportunity to do so but they did not. The evidence showed that at the time the wills were made, both of them were still capable of moving about and that they were mentally alert. (*William Henry Baily & Ors v. Charles Lindsay Bailey & Ors;* refd) (paras 19, 21 & 22)

Case(s) referred to:
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(dist)***
Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA ***(refd)***
William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors [1924] 34 CLR 558 ***(refd)***

Other source(s) referred to:
Theobald on Wills, 15th edn, p 36

A *For the plaintiffs - Tan Chee Keong; M/s CK Tan & Co*
For the defendants - Claudia Cheah (Susannah Ng with her); M/s Skrine

Reported by Ashok Kumar

B

JUDGMENT

Hinshawati Shariff J:

Background Facts

C **[1]** The first to the ninth plaintiffs are brothers and sisters and the children of the late Wong Lok Dow ("WLD") and his wife, the late Leong Siew Hwa ("LSH"). The first defendant is the third child and the second son, and also the father of the second defendant. Of the nine plaintiffs, only the third plaintiff (PW1), the D fifth plaintiff (PW2), the seventh plaintiff (PW3), the eighth plaintiff (PW4), the sixth plaintiff (PW5) and the fourth plaintiff (PW6) testified. For the defendants, the witnesses are Madam Tan Kwan Ling (DW1), Mr Lee Chee Kwang (DW2) as well as the second defendant (DW3) and the first defendant (DW4) themselves. DW2 E is an advocate and solicitor, practising under the style and name of Messrs Nordin Torji & Partners whilst DW1 is his wife and works as an administrative assistant in the same firm. Needless to say, Messrs Nordin Torji & Partners were the solicitors who prepared the will dated 2 June 1997 ("the first will"), the will F dated 24 December 1997 ("the second will") and the will of LSH also dated 24 December 1997 ("the third will"). The same firm also prepared the declaration of *inter vivos* gift dated 1 May 2002 ("the *inter vivos* gift").

G **[2]** Based on the evidence it appears that the family of WLD lives a normal life. Like many of his generation, WLD had migrated from China. Like many of his generation too, WLD had in the early years probably gone through the rigors of a migrant's life. It must have been, I believe, through sheer hard work and tireless H efforts, that WLD had taken care of his family of twelve. This is borne out by the fact that the evidence show that WLD had only the coffee shop as a means of livelihood. It is also not difficult to conclude that from the earnings of his coffee shop, WLD had gone on to acquire further assets, which assets are the subjects I of the wills and the *inter vivos* gift. They are the same assets which have now become the cause for dispute amongst the children of WLD.

[3] The start of the story which led to the filing of these suits, happened sometime in June 2003. That was well after the death of their mother LSH who, according to the death certificate, died of old age on 31 December 2002 (p. 15 of Bundle B – exh. P1). It was also about a month after the death of WLD, who passed away on 8 May 2003. The cause of his death as stated in the death certificate is sakit tua (p. 14 of Bundle B – exh. P3). LSH and WLD died at the age of 81 and 88 respectively.

[4] On that day in June 2003, according to the evidence of PW5, he had at about 5.30pm returned home from buying some groceries. As he opened the gate to get into the coffee shop, where he was still resident, he saw a brown envelope lying on the floor. He opened the envelope, looked into it and saw some photostated documents. That evening after his dinner and bath, PW5 took the envelope with the documents in it to one of his cousins who in turn told him the documents are the wills of his parents. The next day, PW5 took the same envelope with the documents to his elder brother, PW1, who told him to keep the documents in a safe place until they have an opportunity to ask the first defendant about it.

[5] Presumably, there must have been some uproar amongst the plaintiffs upon learning the existence of these wills. Presumably, it must also have been discussed and agreed between the plaintiffs because after the one hundred days' ceremony for their father, PW5 said that all the five brothers, ie, PW1, PW2, PW3, Wong Twee Keng (the first plaintiff) and he himself went to meet the first defendant at the Methodist English School at Banting, at which place the first defendant had been operating the canteen. The first defendant then asked his brothers to wait whilst his son, DW3, made a telephone call to DW2. We will recall that DW2 is the advocate and solicitor whose firm prepared the wills and the *inter vivos* gift. When DW2 arrived at the school canteen, he met the parties and according to DW2, he had thereafter explained the contents of the wills to the five brothers. There was nothing in the evidence to show if anything had happened after this meeting in the school canteen.

[6] The plaintiffs subsequently engaged the services of Messrs CK Tan & Co to represent them. For the record, there are two suits here. CS 22-107-2007 is in respect of the plaintiffs' claim based on the wills and CS 22-178-2006 is in respect of the plaintiffs' claim based on the *inter vivos* gift and power of attorney. These two suits were later consolidated by the order of court dated 2 July 2007 and were hence heard together.

[7] For the better understanding of the plaintiffs' predicament, I shall now allude to the contents of the wills and the *inter vivos* gift. Just before that, I need however to go back a little in time to mention that WLD was a 1/3 shareholder and a co-owner of a piece of land held under EMR 3587 Lot 1702, Mutiara Tanjung Duabelas, Daerah Kuala Langat, Selangor, ("the land") together with Wong Kang Hwee (1/3 share), Tan Kok Yong (1/6 share), and Tan Chit Kwang (1/6 share). It is not disputed that the co-owners of the land had entered into a joint venture agreement dated 17 October 1995 ("the JV Agreement") (pp. 1-3 of Bundle B) with Pengasas Development Sdn Bhd ("the developer"). Under the JV Agreement, WLD became the owner of four units of houses held under:

(i) PT 511 Seksyen1, HS (M) 11699

(ii) PT 512 Seksyen 1, HS (M) 11700

(iii) PT 513 Seksyen 1, HS (M) 11701

(iv) PT 517 Seksyen 1, HS (M) 11705

(hereinafter referred to as "the JV Properties").

[8] Reverting to the wills, the first will (pp. 21-22 of Bundle C – exh. D25) was executed by WLD when he was aged 82 years and six months. In this will, WLD had appointed LSH and the first defendant to be the executors and trustees. In this will too, WLD bequeathed to his wife and his son, properties held under:

(i) EMR/Number Tanah 3587 Lot/Survey Number 1702 Mukim Tanjung Duabelas, Daerah Kuala Langat Selangor (in which WLD's share was 1/3 of the land); and

(ii) HS(D) 744, No. PT 272, Sect. 1, Bandar Banting, Daerah Kuala Langat, Selangor (which is the coffee-shop also known as having its address of No: 28, Jalan Teluk Bunut, Banting).

[9] The said will was then superseded by the second will (pp. 12-15 of Bundle C – exh. D26), executed by WLD when he was aged 83 years. In this will, WLD had appointed LSH, the first defendant and the second defendant as executors and trustees. The other difference and a crucial difference at that between the first will and the second will is that WLD had expressed his wish that "If my abovementioned said wife predeceases me, then all my properties, rights, interests, claims, both real and personal, properties of whatsoever description, shall be given to my son, WONG SWEE MIN, NRIC NO: 410326-10-5106/0526386, absolutely".

[10] The third will (pp. 16-19 of Bundle C – exh. D27), was executed by LSH when she was 76 years old. Her assests included a house held under GM 699, Lot 547, Seksyen 1, Mukim Tanjung Duabelas, Daerah Kuala Langat, Selangor ("Lot 547") and premise known as HS (D) 744 No. PT 272, SECT 1, Bandar Banting, Daerah Kuala Langat, Selangor. Under this will, LSH also bequeathed these properties to the first defendant.

[11] Apart from the second will, of which I shall hereafter refer to as the last will of WLD, the latter also executed a declaration of *inter vivos* gift dated 1 May 2002 (pp. 8-11 of Bundle C – exh. D29) and this means it was done about 12 months prior to WLD's death. By way of this gift, the JV properties were to be transferred to the first defendant. The said JV properties were so transferred on 30 July 2007, about nine months before the death of WLD.

The Law

[12] There are a host of authorities on the present subject. The first of which I shall refer to is the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309. At p. 321, Steve Shim (CJ Sabah & Sarawak, as he then was) delivering the judgment of the court held:

> It is trite law that for a will to be valid, a testator must have testamentary capacity. Whether a testator has testamentary capacity depends on the facts of each case. What is meant by testamentary capacity has been laid down by Chief Justice Cockburn more than a century ago in *Banks v. Goodfellow* [1870] LR 5 QB 549. This case was cited copiously by the Court of

Appeal in the instant case. For the sake of emphasis, it is appropriate to repeat the sentiment expressed by Cockburn CJ who said *inter alia*:

> It is essential to the exercise of such a power that the testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the later object, that no disorder of the mind shall posed his affection, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made ... In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of imbecility and yet he may possess sufficient understanding to direct how his property shall be disposed of.

[13] Then, at p. 322 of the same judgment His Lordship went on to hold:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie, that where the validity of a will was challenged, the burden of providing testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will, that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will.

[14] As to the proof of testamentary capacity that is required, the Court of Appeal in *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97 held:

> Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.

What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include sanity at the time of making or giving instructions for the making of the will.

The Plaintiffs' Case

[15] It is the plaintiffs' pleaded case that both WLD and LSH did not have the testamentary capacity at the time of execution of the wills and the *inter vivos* gift. It is also their pleaded case that the documents had been executed in suspicious circumstances.

[16] In this regard, PW1, PW2, PW3, PW4, PW5 and PW6 testified that their father, WLD, underwent a spinal operation in 1996 and he was at that time 82 years old. WLD apparently never quite recovered as he had to be confined to the wheel chair. The children said their father could only walk two or three steps at a time using a stroller and then he would stop to catch his breath. The state of health of both WLD and LSH's was elicited through the evidence of Wong Ah Boy (PW6) who is also the fourth plaintiff in these suits. PW6 is working as a nurse at the Bina Clinic. Her employer, Dr. KK Mandal had been the family doctor for many years and since PW6 is a nurse, she had always been the one shouldered with the responsibility of taking care of the parents' medical needs. It is not in dispute that LSH had an operation in December 1996 for perforated antral gastric ulcer (p. 239 of Bundle B – exh. P2). Before that, in 1994, she had acute abdominal pain and was hospitalised in Banting District Hospital for one week. She was then transferred to Klang General Hospital where she was diagnosed as suffering from gastric ulcer. Then, on 10 or 11 September 2001, when she was 81, LSH had a fall whilst helping WLD to the bathroom. She was said to have injured her spinal cord, was in extreme pain and could not move at all. Dr. Mandal treated her. However, since there was no improvement, Dr. Mandal recommended that she be transferred to Sri Kota Medical Centre in Klang on 13 September 2001 for physiotherapy. She was further admitted to the Columbia Asia Rehabilitation Centre in Shah Alam for occupational therapy. She remained there for another three weeks. In December 2002, LSH had a relapse of her perforated gastric ulcers and was admitted to Banting District Hospital where she was until she died on 31

December 2002. As far as WLD is concerned, PW6's evidence was that her father had been suffering from hypertension and spinal problems for some time. He subsequently died on 8 May 2003.

[17] It is obvious from the pleadings as well as in evidence that the plaintiffs' contention is based on the fact that their parents were, given the detailed account of the illnesses which they had and their age, both frail and unhealthy and it was in that circumstances that the wills and the *inter vivos* gift were executed.

[18] I am mindful of the various case laws which had been brought to my attention by counsel on both sides. In *Gan Yook Chin* (*supra*), the daughter of the deceased brought the action to declare the will invalid on two grounds namely, that the deceased was at the material time so enfeebled by illness as to be incapable of having a sound disposing mind and, that the will was a forgery. In this case, the deceased had advanced mid-oesophageal carcinoma. The Federal Court reaffirming the judgment of the Court of Appeal said:

> The Court of Appeal held that the time for determining the mental capacity of the testator who made the will was the time when the will was executed. The Court cited various authorities including *Billinghwa v. Vickers* [1810] ER 956; *Choo Ah Pat v. Chan Yee Wan* [1974] 1 MLJ 62 and *Mahendran v. Arumuganathan* [1999] 2 SLR 579. *Theobold on Wills* (15th Ed) was cited on, in particular at p. 32 which stated that "the testator must have testamentary capacity at the time he executes the Will". *Banks v. Goodfellow* was cited as a footnote. In our view, that is the correct statement of the law.

[19] In the present case, the last will of WLD was executed on 24 December 1997. It was the same with the will of LSH. As already stated, WLD died in 2003 whilst his wife, LSH died in 2002. There was a clearly a space of about five years before their deaths when both wills were executed. In my view, if WLD and his wife wanted to change their wills, they had more than ample opportunity to do so. The fact is they did not. Further, in the same case the Federal Court citing the cases of *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 34 CLR 558, quoted what Isaacs J, *inter alia*, said which is:

> A man may freely make his testament, how old soever he may be, for it is not the integrity of the body but of the mind, that is requisite on testaments.

[20] I have very carefully gone through the evidence of the witnesses on both sides and this is what I find. The plaintiffs have all confirmed that both the parents were generally not in good health. However, the evidence show that this was so only during the period between 2001 and 2003. In fact, in 2001 itself the plaintiffs confirmed that WLD and LSH took a trip to China because WLD upon learning that he was having cancer, wanted to visit his relatives in Hainan Island for the last time. The picture which was taken whilst on that trip (p. 7 of Bundle C – exh. P14) show LSH standing whilst WLD was seated on a wheel chair. Although seated, WLD was holding a walking stick. PW5 in her evidence confirmed that the walking stick is a 'spare' "in case he wants to stand up and needs the support" (see p. 18 of the notes of evidence). This can only mean that WLD could on this trip, still walk. He probably could not move about or walk unaided and that accounts for the walking stick. The photostated copy of LSH's passport (pp. 155 to 159 of Bundle B) shows that this trip was made on 28 March 2001 and that would be about three years after they had made their wills.

[21] Much hype was advanced by the plaintiffs of the physical condition of their parents and in particular, that it is unlikely or almost virtually impossible to believe that the parents had gone to the office of Messrs Nordin Torji & Partners by themselves and then climbed up three flights of stairs to get to the office for the purpose of executing their wills. This contention of the plaintiffs, however, had been refuted by the admission of both the first and second defendants who testified that they were the ones who brought WLD and LSH to the lawyer's office. This admission by the defendants and coupled with the fact that WLD and his wife had made the trip to Hainan Island in 2001 show that four years earlier, ie, at the time of making the wills, WLD and LSH were still capable of moving about, and this finding naturally defeats the plaintiffs' contention that their parents could not have gone to the office of Messrs Nordin Torji & Partners by themselves.

[22] The plaintiffs also testified that both WLD and LSH had all along, right up until the time of their deaths, been mentally alert especially in money matters. According to Wong Ai Khen (PW4), just a few days before her mother's death, the latter had told PW4 that all her money was taken by the first defendant and she was worried she would not be able to pay her sundry bills of

A RM1,500. According to PW4 too, at the wake of her mother, WLD had told her of his concern with the situation of PW5 after he passes on as PW5 had no income of his own and was living and dependent on his parents for financial support. This evidence, in my view, show that both WLD and LSH were during this time
B still very much alert and the plaintiffs' contention of their parents' lack of testamentary capacity cannot, therefore, be true.

[23] On the evidence adduced, on the illnesses and the subsequent health conditions of both WLD and LSH and the fact
C that they were 83 and 76 years old respectively in 1997, I do not on the facts find that those circumstances had vitiated the testamentary capacities of WLD and LSH. The plaintiffs' contention on the ground that their parents did not have the required testamentary capacities when they executed their wills and
D the *inter vivos* gift must, therefore, fail.

[24] I shall now move to the plaintiffs' next ground, which is, the contention that the wills and the *inter vivos* gift had been made in suspicious circumstances. Mr. CK Tan for the plaintiffs and Ms Claudia Cheah for the defendants had drawn my attention to
E the case of *Tho Yow Pew & Anor v. Chua Kooi Hean* (*supra*). Gopal Sri Ram JCA (as he then was) referred to *Theobald on Wills* (15th edn.) at p. 36 under the heading "suspicious circumstances". It says:

F > If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the
G > testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was proposed by a person who takes substantial benefits under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor
H > chosen by the person.
>
> However, circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstance attending, or at least relevant to, the preparation and execution of the will itself.

I

> It is clear from the foregoing passage, in particular from the passage in *Theobald on Wills* that suspicious circumstances in the context of wills **relate to circumstances surrounding the making of the will**, not circumstances surrounding the testamentary capacity of the testator. In other words, if a propounder of a will wishes to succeed in obtaining probate, he must upon a challenge being taken establish (a) testamentary capacity; and (b) dispel any suspicious circumstances surrounding the making of the will (emphasis added).

[25] Now, looking at the circumtances surrounding the making of the wills and the *inter vivos* gift in this case, I will have to say that there are certain observations which I cannot ignore.

[26] I start with the evidence of DW2. He said the contents of the wills had been explained to WLD and LSH, and later the *inter vivos* gift to WLD, in Mandarin and Hokkien. In fact, in examination-in-chief, DW2 said he explained to them in Chinese (Q & A No: 35 and 45). It was only upon further probing by Mr. CK Tan that DW2 said the contents were explained in Mandarin and Hokkien dialects. The plaintiffs in their evidence said WLD spoke mainly Hainanese, a little Malay and simple greeting words in Hokkien and Mandarin. Their mother, LSH, spoke only Hainanese dialect. DW2 said that WLD spoke Hokkien "... with a dominant Hainanese accent". Although I agree that there is no direct evidence that WLD and LSH could not understand either the Mandarin or Hokkien dialect, the fact that DW2 detected the dominant Hainanese accent should have put him on alert as to whether WLD and LSH fully understood what was explained to them. As a senior practitioner, I would have no doubt that DW2 is only too aware of the importance of the contents of the will which must be explained and understood by the testators particularly in this case where the testators were not educated persons and will undoubtedly rely on the assistance of DW2. It was also not in evidence in what dialect were the instructions given by WLD and LSH to DW2. Would it not be more prudent then for DW2 to get the services of someone who speaks the Hainanese dialect so as to ensure that WLD and LSH really understood what was explained to them? The fact that DW2 admitted WLD spoke with a dominant Hainanese accent, would that not suggest that WLD, and probably LSH too, would be more comfortable with Hainanese dialect rather than Mandarin

or Hokkien? Based on the evidence, I would have to say that I have my reservations as to whether WLD and LSH fully understood the contents and the implications of the wills and the *inter vivos* gift as allegedly explained to them by DW2.

[27] Then, there is also the issue of the witness to the wills. In the present case the witness to the wills of WLD and LSH was DW1 who as had been introduced in the beginning of this judgment is the wife of DW2, the attesting solicitor. Mr. CK Tan had posed to both DW1 and DW2 in cross-examination whether by DW1 signing as a witness, this put her in a situation of there being a conflict of interest and both witnesses answered that question in the negative. I cannot agree. I cannot see how the testimony DW1, not being an independent witness as she is the wife of DW2 can be given any weight as she is surely an interested person. To me, a witness as in the case of DW1 here, must not only really and actually be independent and divested of any interest in the matter but like justice, it must also be seen that she is so. It is very difficult to draw this line in the present case as DW1, being the wife of DW2, it is without basis, to say that she has totally no interest and that her evidence is independent. I have to agree with Mr. CK Tan that by acting as a witness to the attestation of the wills, DW1 has put herself in a position of a direct a conflict of interest and on this ground, I therefore choose to disregard her evidence.

[28] The plaintiffs had also alleged that it is not possible for their parents to have gone to the lawyer's office all by themselves. That, however, is no longer an issue since the defendants in their evidence had admitted that they were the ones who had brought WLD and LSH to the office of Messrs Nordin Torji & Partners. Considering that DW2's house is near to WLD's and that the coffee shop is only about 1.5km from DW2's office, the defendants had certainly made an effort to take time off from their busy schedule in running the school canteen, as claimed by them, so that they are able to take WLD and LSH to the lawyer's office. In this respect, perhaps it is relevant to note the observations made by Dato Dr. Charles David, the Consultant

Orthopaedic Surgeon with Subang Jaya Medical Centre (SJMC). In the medical report dated 3 March 2005 (exh. D24) addressed to Messrs CK Tan & Co, the doctor commented:

> Since I did not see him after March 1997, it is difficult for me to comment on the question asked with regard to his mental state and his physical fitness to climb 3 flights of stairs.
>
> The only thing I can comment is that it would be difficult for an 82 year old man with a back problem to climb 3 flights of stairs.

[29] The question that comes to mind is why put WLD and LSH to so much trouble when the same purpose can be achieved by DW2 going to the coffee shop or even WLD's house? After all, DW2 did say that he had known WLD since he was in Standard Two and given the fact that this was a man of 82 and a woman of 76 years of age, I think it would be more convenient for them to receive DW2 at the coffee shop rather than WLD and LSH climbing up the gruel three flights of stairs to get to DW2's office. I can only conclude from these facts that WLD and LSH had been persuaded to go to the lawyer's office for possibly one reason and that is none other than to keep the making of the wills a secret from the plaintiffs because PW3 and PW5 were living with WLD and LSH then. It must also be remembered that DW2 in his evidence confirmed that the appointments were made by the first or second defendant although the first defendant was adamant he was not told the reason for the visit to the lawyer's office. I will also have to say that I find this very difficult to believe. They made the appointments. How can they not know for what purpose was WLD and LSH going to the lawyer's office?

[30] It had also been impressed upon me that both the defendants were close to WLD and LSH. They cited several instances to show this. The first defendant said his family were always at the reunion dinners on the eve of Chinese New Year with WLD and LSH and that the first defendant's wife had been cooking the dishes every year for the dinners on the second day of Chinese New Year. Although the first defendant alleged that the plaintiffs do not eat at the reunion dinners and this had displeased WLD, I find nothing in the evidence to support his allegation. All the plaintiffs said they have been attending the dinners. The fact that the first defendant's wife had been cooking for the second day dinners, if it is true, cannot be construed as

putting them in a more favourable position than the rest. More so because the plaintiffs' claimed that she was paid RM1,500 to do the cooking. This allegation was denied by the defendants but in my view, the probability of it being true is quite high since the defendants are operating a school canteen and it is not without basis to assume that the wife does the cooking and that was probably the reason why she had also cooked for the said dinners.

[31] The defendants also claimed that it was the second defendant who would fetch WLD and LSH when they needed transport. This claim is, however, neutralised by the second defendant's own evidence that the other grandchildren are still small and in school and the eldest grand daughter lives in Tanjong Sepat which is about 45 minutes away from WLD's house. This will naturally explain WLD and LSH's reliance on the second defendant for transport. It was probably for the same reason why LSH had a joint account with the second defendant. Also, not forgetting the fact that the second defendant speaks English.

[32] Of the contention that the salary of the Indonesian maid employed to take care of WLD and LSH was allegedly paid from the first defendant's pocket, I find no evidence to support this. True, the maid was employed in the name of the first defendant and that she had received RM4,785 (exh. D8) from the first defendant, but that, in my view, is different from saying that her salary was paid by the first defendant. It must not be forgotten that the first defendant is operating a school canteen and to take on an Indonesian helper is a more convenient reason for him to apply for the maid to be registered under his name. The issue, however, is who had paid for the maid's salary? Even if I accept this allegation to be true, how does this fact put the first defendant in a more favourable position than his other siblings to the extent of them being excluded entirely from their parents' wills?

[33] So are the other claims made by the defendants whether it was the first defendant who had rushed LSH to the hospital before she died or that the second defendant had a joint account with LSH or that the second defendant was appointed by WLD as his attorney in respect of the JV Agreement, are matters which I do not consider as showing that the first defendant's family had

been close to WLD and LSH. To construe this evidence in the manner which was contended by the defendants would mean having to ignore the rest of the evidence as for instance the fact that PW5 is not married and had lived and took care of WLD until his passing or that it was the sisters who attended to WLD when he was admitted to SJMC or that PW2 had returned to Banting from Pahang to take care of his parents, at the request of his other siblings and it was PW1 and PW3 with their wives who accompanied WLD and LSH on their last visit to Hainan Island. In fact, the second defendant himself said when his grandparents were in the hospitals, most of the time they were looked after by his auntie, PW4 (see p. 169 of notes of evidence). These are the evidence which were not challenged and when taken together, they not only go to show that the plaintiffs had a good relationship with WLD and LSH but of greater significance is that the evidence had neutralised the defendants' contention that they were the ones closest to their parents. The sum total of these allegations by the defendants on their relationship with WLD and LSH, in my view, is either unsupported by evidence or that they had been explained, so that at the end of it, I cannot say that the defendants have proven they were closer than the rest of his siblings to WLD and LSH.

[34] The evidence also show that when the plaintiffs were children, they did not finish their secondary schooling. PW5, in fact, was only educated up to standard three or four, whereby he had then stopped schooling because he said he was always bullied and teased by the other children. Apart from the first defendant who had, after he left school worked as a salesman for Singer Sewing Machine and this is confirmed by the first defendant himself (see p. 204 of the notes of evidence) the sons according to the plaintiffs, had to help in the coffee shop, fed the pigs as well as clearing and maintaining the oil palm smallholding. The four daughters on their part, had to do the house work and at the same time helped in making kaya, cakes and other types of food for sale at the coffee shop. They also helped in taking the customers' orders and washed cups and plates in the coffee shop. When they are older and have their own families, only PW5 remained with their parents. According to PW5, he attended to his father's needs and did the marketing for his parents as he knows what they like to eat. PW5 did things like bathing his father, cooked breakfast, lunch and dinner, cleaned him after his

toilet needs and put him back to bed in the nights. Before his mother died, PW5 had the assistance of an Indonesian maid to attend to her needs.

[35] The evidence further show that all the children had regularly attended the Chinese New Year reunion dinners and also the dinners held on the second day of Chinese New Year. Although there is a dispute on some matters that were said during these dinners, the unchallenged fact is that all the children had attended the dinners, thereby suggesting that there were no quarrels between the siblings nor were there quarrels between WLD and LSH with any of the plaintiffs. Given the fact that the dinner held on the eve of Chinese New Year is an important event for a Chinese family, of which I am entitled to take judicial notice of, I would place great reliance on this evidence to support my view that there was nothing amiss in the relationship between the plaintiffs and their parents, thereby negating the defendants' contention that WLD and LSH were unhappy with the plaintiffs.

[36] Learned counsel for the defendants submits that this court should not be concerned with the fairness of a will. She said it was the prerogative of parents if they choose to favour one child and furthermore, the plaintiffs she said had unanimously agreed under cross-examination that it was entirely up to their parents as to how they wish to distribute their assets and their parents are not obliged to tell them of the making of the wills.

[37] It is true and I accept the submission of learned counsel that "a court must resist the natural temptation to set aside the will on the ground that it did not appear to be fair, equitable or just" (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97). I would, however, draw a distinction between that case and the instant case. In *Lee Ing Chin* (*supra*) the daughters and the sons were each bequeathed with the assets of the deceased although the latter took a greater portion than the former. In our case, the bequest was made in favour of one child and the grandson to the total exclusion of not one or two but all nine of the other children. In the light of the evidence presented in which, I do not find the slightest hint of anything that can be described as anything but normal in the relationship between WLD, his wife and his children, particularly the plaintiffs,

and as such I would say that this is a situation which the defendants must be able to explain. I am of the view that this is a situation which can be described "... As a circumstance that ought generally to excite the suspicion of the court". (see *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] I LNS 340).

[38] There was a feeble attempt by the defendants to show that the relationship between his father and his siblings was not good. The first defendant claimed that his parents had been disappointed because the other children had not joined them for the reunion dinners and that WLD had complained to him that PW5 had hit his head several times (Q & A No: 3). This was put to the plaintiffs and they had denied the allegation. I choose to believe the plaintiffs rather than the defendants. I choose to do so because the allegation of the defendants is so general a statement. He did not say which of the children or was it all of the plaintiffs who did not come for the reunion dinners. Even that were merely his words and there is no proof to support his allegation. On the allegation that PW5 had hit WLD's head several times, I find this allegation is not substantiated as well. If it is true that PW5 had done that, surely WLD had complained of it to his other children as well. This too is a general statement. How is it that the first defendant himself, being an elder brother, did not see it fit to advise or reprimand PW5 about it? I, therefore, find, these allegations not proved particularly when tested against the rest of the evidence.

[39] Then, is also the letter from Messrs Nordin, Torji & Partners dated 19 June 2004 (exh. P30). In the letter, DW2 had stated:

> Both the testators had informed and express to Lee Chee Kwang that in their old age they care absolutely disappointed with the ways which they were treated by the relevant children. Your clients would have the details.

This letter, however, is of no help to the defendants' case. Apart from what is stated in the letter, I do not see anything in the evidence which would throw any light on the so-called details referred to by DW2 in that letter. DW2 had even testified that he had asked "repeatedly if he was sure to give to just one son as it was my first case when all assets of a testator was to be given to only one beneficiary. I know that he had more than a few children" (see p. 128 notes of evidence).

[40] DW2 did not probe further on the reason for giving all the assets to the first and second defendants although as a matter of prudence, I think DW2 should have done so and thereby help solve the problem which have now come about. Be that as it may, he did not and that letter, exh. P30, does not in my view, support the defendants contention that his parents were actually unhappy with his other siblings.

[41] It is also very apparent that the JV Properties which truly form the bulk of WLD's assets had been transferred to the first defendant. This was made possible by the *inter vivos* gift executed by WLD in favour of the first defendant. One could, of course, argue that WLD had not changed his intention because by his last will, WLD had also bequeathed the JV Properties to the first defendant in the event that LSH predecease him. On the face of the transactions, it does appear innocuous except that, if the JV Properties had already been bequeathed in the last will for the benefit of the first defendant, why is there then need to give the said properties to the first defendant by way of the *inter vivos* gift?

[42] The first defendant was cross-examined rigorously as to the meaning of the word *'inter vivos'*. Under the cross-examination, he was asked by Mr. CK Tan as to how he had acquired the knowledge on the *inter vivos* gift and this is what he said:

Q : Do you know what *inter vivos* gift is?

A : It is a gift during a person's lifetime.

Q : What told you this meaning?

A : Dictionary.

Q : Which dictionary did you use?

A : An English-Chinese dictionary.

Q : Name?

A : I did not take notice YA.

Q : Do you know the origin of this word?

A : No I do not know.

Q : I put it to you that this is a Latin Word which is a dead language for 5000 years and is not found in any English-Chinese dictionary. Do you agree? A

A : I am unsure YA.

Q : But you told the court that you found this word in a dictionary? B

A : I am not sure YA.

Q : Can you bring this dictionary to the court at the next hearing? C

A : I have to see if the dictionary is still around.

Q : Who advised you to use this *inter vivos* gift document?

A : Nobody taught me YA. D

[43] When the trial resumed on 17 February 2012, the first defendant tendered the *Merriam-Webster Collegiate Dictionary* (11th edn.) (exh. D41) and in his cross-examination that day, he claimed that the word *'inter vivos'* was told to him by his son, the second defendant. Based on his own testimony, it is obvious that the first defendant had no inkling whatsoever as to the nature of an *inter vivos* gift. It is obvious too that the suggestion must have come from DW2. Putting the pieces together it is also apparent that the *inter vivos* gift is to ensure that the first defendant gets the JV Properties because at some point of time, the first defendant must have realised that bequeathing the JV Properties by way of the wills is not a guarantee that the properties will be his. At some point of time, the first defendant must have thought of probable litigations whereby there is every possibility that the wills may be challenged by his siblings. E F G

[44] It must be noted that in 2002, WLD was already diagnosed with cancer and the evidence show that he was having some difficulties moving about. He had a urine catheter attached to him. He was already 87 years old then. The first defendant could have waited for the JV Properties to pass to him as he had been named the beneficiary. What other possible reason can there be for not wanting to receive the JV Properties after the death of WLD? In my view, the inevitable conclusion which can be drawn H I

from the facts is that the *inter vivos* gift was created so that the JV Properties which, as mentioned earlier form the bulk of WLD's assets, would for certain fall into the hands of the first defendant.

[45] Even the explanation given by DW2 as to why there is a need for the *inter vivos* gift, seems somewhat improbable. Mr. CK Tan had posed the question as to why there cannot be an outright transfer, and the following is the testimony of DW2 in that respect (see p. 154 of the notes of evidence):

Q : When you prepared the *inter vivos* gift, who gave you the details on page 3, Bundle C?

A : Either D1 or D2, together with the photocopied titles.

Q : What was the purpose of preparing the Declaration of *inter vivos* gift when there was already a will?

A : Wong Lok Dow wanted to give when he was alive and not when he died. The *inter vivos* gift is effective upon grant and immediately whereas the will is different and that was his intention.

Q : Why didn't you do a transfer right away?

A : They have the photocopied title and not the originals. That much I can remember.

Q : If they have the photocopied title, would they not have the originals?

A : Disagree.

Q : Why?

A : I have no actual or personal knowledge of that, so I cannot agree.

Q : Mr. Lee, I presume you are more of a conveyancing lawyer. You would probably know that there is an original title kept either with the Registry or Land Office and that you can obtain the title and do the transfer?

A : I am unaware of such practice.

Q : Now I put it to you that your main reason of preparing this Inter Vivos Declaration was to ensure that all these four properties from the JV would pass to the hands of the Defendants and by passing all the other children?

A : Yes. It was the intention of my client. A

Q : So you confirm that you acted on the instructions of your client?

A : Yes.

B

Q : Was this Inter Vivos Declaration specifically prepared for this purpose?

A : Yes.

Q : And this was prepared on 1-5-2002? C

A : Yes.

[46] Adding mystery to the execution of the *inter vivos* gift is the fact that the instrument was signed by WLD at the open car park of SJMC. In this context it is also pertinent to note the contents D of the letter written by DW2, dated 19 Jun 2004 (exh. D30). It is reproduced below:

Nordin Torji And Partners
Peguambela & Peguamcara
Pesuruhjaya Sumpah E

Tel : 03 3181 7188 Fax : 03 3181 7189
Tingkat 3, Bangunan Bank Pertanian Malaysia,
123 Jln Sultan Abd Samad, 42700 Banting, Selangor.

Your Ref : W/3/TCK/2004/LIT F

Our Ref : 19/6/2004

To
C K Tan & Co, Tel : 3341 8742
1A, Lorong Raja Hassan Fax : 3341 4244 G
41400 Klang.

Dear Sir,

Wills Of : Wong Lok Dow Leong Siew Hwa
Declaration Of Inter Vivos Gift By Wong Lok Dow H

We refer to your letter dated 16/6/2004.

We confirm that C K Lee prepared both the above 2 wills and the above mentioned declaration. I

2. Both the wills were executed in this office and during office hours in one occasion. Both Lee Chee Kwang and Tan Kwee Ling were the witnesses for both the wills. Both the testators were physically able to walk up 3 floors to this office without any aid, and in fact for more than one occasions our C K Lee even sent them out right to the first flight of stairs going down, as a sign of respect for the senior clients.

   Both the testators had informed and expressed to Lee Chee Kwang that in their old age they were absolutely disappointed with the ways in which they were treated by the relevant children. Your clients would have the details.

3. Lee Chee Kwang prepared the above mentioned declaration and witnesses the execution of the same not in this 2004, but a place (regularly attended by him) and time convenient to Wong Lok Dow as he was not physically convenient to climb 3 floors to this office.

Your sincerely for

-signed-

Nordin Torji And Partners
CK Lee

[47] D30 is a contemporaneous document having written soon after the wills and *inter vivos* gift surfaced and yet DW2 did not deem it fit to inform Mr. CK Tan that the *inter vivos* gift was signed at the open car park of SJMC. DW2 in the above letter merely mentioned that the *inter vivos* gift was execute at "... a place regularly attended by him". Further, at the risk of repeating myself, would it not be more practical and convenient and even proper for DW2 to have the document signed at the coffee shop or at WLD's house rather than for both parties to travel all the way from Banting to SJMC to have the document signed? The signing which was pre-arranged by the second defendant and the place at which it was signed, in my view, lends a lot of weight to the plaintiffs' contention that it was done in that manner so as to avoid the other children from knowing the existence of the *inter vivos* gift. The first defendant's denial that this was so and he claimed that it is because his father did not want the children to quarrel, is preposterous, to say the least.

[48] Finally, not forgetting that it was the defendants who had insisted that WLD and LSH had the testamentary capacities when they made their wills, it is also equally true to say that they were both very much in control of their mental qualities and in that circumstances how could it be possible for WLD and LSH to have named only one child (and a grandchild) to enjoy the fruits of everyone's efforts, including the plaintiffs. It is an undeniable fact that all the children had worked and helped their parents together and whatever WLD and LSH had until the time of their deaths were the result and contribution of their efforts as a family. I cannot for one moment imagine that the parents would allow only one child and one grandson to take the whole of the benefits and depriving the rest.

[49] I am, therefore, convinced that when all the pieces of evidence are put together, they point to an irrefutable conclusion that there are indeed suspicious circumstances surrounding the making of the wills and the *inter vivos* gift and that the defendants had failed to dispel the said suspicious circumstances. I will therefore allow the plaintiffs' claims in both C.S 22-107-2005 and as 22-178-2006. For the avoidance of doubt, I had ordered that in respect of P.T. 517, Sect. 1, H.S. Mukim 11700 Mutiara Tanjong Duabelas, Daerah Kuala Langat, Selangor, the defendants are to make restitution (a sum equal to the purchase price) to be paid to the estate WLD within six months from the date of this order and in respect of P.T 511 Sect. 1 H.S (M) 1169, Mukim Tanjong Duabelas, Daerah Kuala Langat, the defendants are to redeem this property from Public Bank Berhad and return it to the estate of WLD, also within six months from the date of this order. I also ordered costs of these proceedings to be borne by the defendants.